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No. 00-1863

In The

Supreme Court of the United States

COUNTY OF LOS ANGELES, et al.,

Petitioners,

v.

VALERIE ANN STREIT et al.,

Respondents,

AND RELATED ACTIONS.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. The Association sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case will have a dramatic and adverse effect on California counties.

In *Streit v. County of Los Angeles*, 236 F.3d 552 (CA9 2001), the Ninth Circuit Court of Appeals has published an opinion which holds California sheriffs function on behalf of counties when they adopt and carry out policies related to the release of inmates from custody. If this opinion survives, counties will be forced to defend § 1983 actions in federal court which would be summarily dismissed by the courts of California. Moreover, they will be forced to litigate and appeal the question of governmental immunity repeatedly in every overdetention case. Consequently, *Amicus Curiae* has a significant interest in obtaining review of this decision in this Court.

CSAC has obtained consent of the petitioners to the filing of this brief. However, despite numerous attempts to contact respondents and obtain consent from them, CSAC has not received any response from respondents

regarding this issue. Consequently, *Amicus Curiae* respectfully requests that the Court grant this motion for leave to file the accompanying brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The California State Association of Counties is a non-profit corporation. The membership consists of the 58 California counties. The Association sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case will have a dramatic and adverse affect on California counties.[1]

In *Streit v. County of Los Angeles,* 236 F.3d 552 (CA9 2001), the Ninth Circuit Court of Appeals has published an opinion which holds California sheriffs function on behalf of counties when they adopt and carry out policies related to the release of inmates from custody. This opinion is at odds not only with established California precedent (which holds that sheriffs perform such functions as officials of the State of California), it ensures that the state's concurrent jurisdiction over claims alleging "over-detention" of inmates is effectively eliminated. If the Ninth Circuit's opinion survives, counties will be forced to defend § 1983 actions in federal court which would be summarily dismissed by the courts of California. Moreover, they will be forced to litigate and appeal the

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae,* its members or its counsel made a monetary contribution to the preparation or submission of this brief.

question of governmental immunity repeatedly in every overdetention case. Consequently, *Amicus Curiae* has a significant interest in obtaining review of the Ninth Circuit's decision in this Court.

ISSUES ADDRESSED BY *AMICUS CURIAE*

1. May the Ninth Circuit reject the determination of California appellate courts that a sheriff adopts policies regarding the release of prisoners in his capacity as an official of the State of California, subject to the control of the California Attorney General? If so, did the Ninth Circuit correctly interpret California law on this matter?

2. Should the Ninth Circuit be allowed to continue developing case law designed to limit the scope of available governmental immunity defenses, even where such a limitation is in direct conflict with the opinions of this Court, the California Supreme Court, and the California Courts of Appeal?

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of California should be permitted to determine who works for it. California has decided, based upon provisions in its state Constitution, state statutes, and recent case law interpreting those provisions in light of *McMillian v. Monroe County*, 520 U.S. 781 (1997), that its district attorneys, sheriffs and judges function on behalf of the State of California when they set policies related to the operation of their respective offices. In *Streit*, the

Ninth Circuit refused to defer to California courts' interpretation of state law and engaged in a *de novo* assessment of that law which is analytically erroneous and contrary to United States Supreme Court precedent.

In *McMillian*, 520 U.S. 781, 793, this Court ruled that sheriffs in Alabama act on behalf of the state, not the county, when they formulate policy. Consequently, they are immune from suit under § 1983. *Id.* at 782. In reaching this conclusion, the Court held that in determining whether a sheriff is an agent of the state, the federal district court's analysis *must be governed by state law. Id.* at 786 ("[W]hether a particular official has final policymaking authority is a question of *state* law," quoting *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989), internal quotations omitted, emphasis in original).

Applying *McMillian* in *Pitts v. County of Kern*, 17 Cal.4th 340, 70 Cal.Rptr.2d 823 (1998), the California Supreme Court held that California district attorneys act as agents of the state of California in formulating policies and procedures related to their official functions. Then, in *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1998), the California Court of Appeal applied *McMillian* and *Pitts* and concluded that sheriffs also act on behalf of the State of California when they formulate policies and procedures for the release of prisoners from custody. The California Supreme Court subsequently denied review.

As the *Peters* court noted, its conclusion was compelled by the virtually identical statutory language which describes the duties of California sheriffs and district attorneys and provides both elected public officials are

accountable only to the voters and the California Attorney General. Their independence from local control eliminates any risk that the board of supervisors will use the sheriff or the prosecutor to investigate and prosecute political opponents or protect political allies. This interpretation of California law is binding on federal courts: "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *see also Martinez v. Gomez*, 137 F.3d 1124, 1126 (CA9 1998) ("our role is to determine what California law is, not what it should be").

California law also makes state court judges agents of the State of California, protected by Eleventh Amendment immunity from suit under Section 1983. *See, e.g., Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (CA9 1987) (relying on California constitution and case law). All three of these independently elected public officials are held to be agents of the State of California, even though their authority is limited to the county that elects them. A county board of supervisors cannot interfere with a district attorney's prosecutorial decisions, cannot interfere with a judge's decisions, and cannot interfere with a sheriff's decisions regarding investigation and detection of crime or operation of the jails. All three are agents of the State of California; all three are protected by Eleventh Amendment immunity.

Consistent with the California Supreme Court's decision in *Pitts*, the Ninth Circuit has ruled that district attorneys act on behalf of the State of California and are consequently immune from liability under Section 1983.

Weiner v. County of San Diego, 210 F.3d 1025 (CA9 2000). The decision in *Streit*, however, veers off in a new and dangerous direction.

In *Streit*, the Court of Appeals purports to draw a distinction – drawn by neither state courts nor this Court – between a sheriff's law enforcement functions (which it defines as state duties) and mere administrative duties (which it finds are county functions). This distinction does not bear analysis and ignores the historical function of sheriffs elucidated by this Court in *McMillian v. Monroe County*, 520 U.S. 781, 794. In fact, it directly contradicts this Court's conclusion that there is no distinction between law enforcement and administrative functions of a sheriff. As the Court observed, " 'In the exercise of executive *and administrative* functions . . . , he (the sheriff) represents the sovereignty of the State. . . . ' " *Id.* (Emphasis added.)

The Court of Appeals also creates a distinction regarding the source of the controlling law on this topic by asserting that the determination of whether a sheriff is an agent of the state of California is an issue of federal law: "Although we must consider the state's legal characterization of the government entities which are parties to these actions, federal law provides the rule of decision in section 1983 actions." *Streit*, 236 F.3d at 560. This statement is meaningless, as there is no federal law that establishes the relationship between a sheriff and the state of California. There is nothing in the United States Code or the United States Constitution that establishes this relationship. California statutes and the California Constitution establish this relationship.

The only possible meaning of this statement is to provide cover for creating an interpretation of California law that contradicts the interpretation of the California courts. The *Streit* opinion demonstrates the emptiness of this statement by proceeding to analyze California statutes to reach its conclusion that the Los Angeles County Sheriff is an agent of the County. If the Court of Appeals accurately states that the issue is one of federal law, then where are the federal statutes that lead to this conclusion? They are absent from the opinion because the practical truth of the matter is that there is nowhere to look but California law on this issue.

By publishing an opinion about state law which contradicts state law as decided by California courts, the Ninth Circuit has ensured that questions of county liability and governmental immunity will be determined differently depending on the forum selected by plaintiffs. California state courts are bound by *Peters*. District courts in California will be bound by *Streit*. This means that the result in a given case will depend on whether a plaintiff files his or her § 1983 claims in state or federal court. This Court should intervene in this action to prevent these conflicting outcomes. Accordingly, *Amicus Curiae* urges the Court to grant the petition for certiorari and overturn the decision of the Court of Appeals.

LEGAL ARGUMENT

1. THE NINTH CIRCUIT'S ERRONEOUS APPLICATION OF *McMILLIAN* HAS CREATED A SERIOUS CONFLICT WITH CALIFORNIA'S INTERPRETATION OF STATE LAW, WHICH HOLDS THAT CALIFORNIA SHERIFFS FUNCTION AS STATE OFFICERS WHEN IMPLEMENTING POLICIES REGARDING THE RELEASE OF PRISONERS FROM CUSTODY.

A. *Streit* Conflicts With California Courts' Interpretation Of California Law And Is Inconsistent With This Court's Decisions.

Under California law, a county board of supervisors cannot order the sheriff to put anyone in jail, or let anyone out. A county, therefore, cannot be liable for the sheriff's policies relating to keeping prisoners in jail or releasing prisoners from jail. California sheriffs are agents of the State of California for the purposes of § 1983 claims, not agents of the counties.

In *McMillian v. Monroe County*, 520 U.S. 781, this Court explained that, in determining whether a local sheriff is subject to § 1983 liability under *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978), "A court's task is to identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *McMillian*, at 784-85, quoting *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989). That inquiry is, in turn, "dependent on an analysis of state law." *Id.* at 786.

In California, it is settled that in administering the jails, establishing policies for the release of prisoners, and other law enforcement duties, a sheriff acts on behalf of the State of California, not the county in which he or she was elected. *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1998). As the California Court of Appeal observed in *Peters*, the State Attorney General is the official with "final policymaking authority" over a sheriff's law-enforcement-related conduct: "[A]rticle V, § 13 of the California Constitution provides, 'Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. . . . The Attorney General shall have direct supervision over every . . . sheriff . . . in all matters pertaining to the duties of [his or her] . . . office[ ]. . . . ' " *Peters*, 68 Cal.App.4th at 1174, 80 Cal.Rptr.2d at 865.

California sheriffs are required to enforce the state criminal law, Cal. Government Code §§ 26600-26602, and *state* law provides the authority for a sheriff to "take charge of and keep the county jail and the prisoners in it." Cal. Government Code § 26605; see also Cal. Penal Code § 4000. A county board of supervisors "ha[s] no direct control over how [sheriffs] perform" this function. *Peters*, 69 Cal.App.4th at 1175, 80 Cal.Rptr.2d at 866; *Brandt v. Board of Supervisors*, 84 Cal.App.3d 598, 601, 602, 147 Cal.Rptr. 468 (1978).

Based upon these provisions of California law – and the fact the California Supreme Court has interpreted mirror provisions relating to district attorneys in exactly the same way – the *Peters* court concluded, "[T]he sheriff operates the jail pursuant to the sheriff's constitutional and statutory law enforcement powers, and not as a

policymaker for the board of supervisors, which has no direct control over the sheriff in this regard. [Citations.]" *Peters*, 68 Cal.App.4th at 1177, 80 Cal.Rptr.2d at 867. That is, the sheriff has no superior within his own county.

This determination that a sheriff is the agent of the State of California is binding on federal courts. This issue is just as much an issue of state law in relation to Section 1983 as is, for example, the statute of limitations. It is well settled that state statutes of limitation and court decisions interpreting those statues are binding on federal courts. *See Wilson v. Garcia*, 471 U.S. 261, 276 (1985). Likewise here, the state statutes and court decisions on this issue are binding on federal courts.

Despite the clear explication of California law provided by California appellate courts, the Ninth Circuit has conducted its own evaluation of California law, reinterpreted it, reweighed its provisions, and reached the opposite conclusion. In *Streit*, the Court of Appeals has held that sheriffs act as county officers when they develop policies related to the release of prisoners, not as officers of the State. Although it acknowledged the existence of the provisions of law discussed above, the court concluded that California Government Code § 25303 provides the "crucial factor," as it grants county boards of supervisors "broad fiscal and administrative powers for the management of the individual county jails. . . . " *Streit v. County of Los Angeles*, 236 F.3d 552, 561 (CA9 2001).

In reasoning to its conclusion, the Ninth Circuit ignored the fact that, although counties are required to fund the sheriff's office, this same Government Code section prohibits interference with the sheriff's duties.

County boards of supervisors have "*no right to control* the operation of the jail[s]; [moreover,] a board of supervisors has no legal authority to use its budgetary power to control employment in or operation of the sheriff's office." *Peters*, 68 Cal.App.4th at 1176, 80 Cal.Rptr.2d at 1176 (emphasis added); *see also Board of Supervisors of SD County v. Superior Court (Armstrong)*, 33 Cal.App.4th 1724, 39 Cal.Rptr.2d 906 (1995) (county board of supervisors improperly found in contempt of court for violating court order capping jail population where sheriff, not county, controls day-to-day jail operations and inmates' lengths of stay); *Lassen County v. State of California*, 4 Cal.App.4th 1151, 6 Cal.Rptr.2d 359 (1992) (jail operations remain a state function despite state laws placing financial responsibility for jail operations on county board of supervisors, including costs to defend suits by inmates alleging unconstitutional conditions).

By refusing to accept the California courts' interpretation of its own state law, the Ninth Circuit has created federal law which is in direct conflict with the law of the forum state. Moreover, as a result of its free-wheeling transformation of state legal principles, the Ninth Circuit has developed federal law in a manner which will result in inconsistent results and remedies being granted litigants, depending on which forum a plaintiff chooses.

B. The Ninth Circuit's Holding is Based upon a Conception of a Sheriff's Functions Which is Historically Inaccurate and Fundamentally Flawed

In deciding the *McMillian* case, this court recognized that, historically, a sheriff " 'represents the sovereignty of the State and he has no superior in his county.' " *McMillian v. Monroe County*, 520 U.S. at 794, quoting 1 W. Anderson, A Treatise on the Law of Sheriffs, Coroners and Constables 5 (1941). This conclusion was equally applicable in the context of a sheriff's executive *and administrative* activities: " 'In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the State. . . . ' " (*Ibid.*)

Despite this clear and inclusive description, the Ninth Circuit has purported to draw a distinction between what it views as legitimate law enforcement functions and administrative or "management" functions, which it erroneously opines are subject to oversight by the county. *Streit* at 561. This distinction is both historically and practically untenable. Historically, it simply is wrong. As the text quoted above demonstrates, the law does not change, whether the issue concerns the sheriff's executive or administrative functions. Either way, the sheriff functions as a state officer. As a practical matter, the Ninth Circuit's determination is out of touch with reality and fundamentally inconsistent with clear provisions of California law, which make sheriffs subject to the control of the California Attorney General, not county boards of supervisors. Just as in Alabama, a California

sheriffs only superior is outside the county – that is, the Attorney General.

Finally, the Ninth Circuit opinion does not explain why the release of a prisoner into the community is not a law enforcement function. Victims who are occasionally terrorized by prisoners mistakenly released invariably complain that the sheriff has failed to do his job of enforcing the law and protecting the citizenry. A fictional distinction which holds that, in releasing prisoners from incarceration, the sheriff does not represent the state but instead is merely performing a management function which is administrative and local in nature, would doubtless appall victims of crime – and it does not bear close analysis.

C. If the Ninth Circuit's Novel Interpretation of California Law Is Permitted to Survive, the State's Concurrent Jurisdiction over Actions Alleging "Overdetention" Brought Pursuant to 42 U.S.C. § 1983 Will Be Effectively Eliminated.

It is well established that state courts of general jurisdiction have concurrent authority to adjudicate federally created causes of action. *Testa v. Katt*, 330 U.S. 386, 389-93 (1947). Consequently, California state courts have concurrent jurisdiction over actions brought under 42 U.S.C. § 1983. *Felder v. Casey*, 487 U.S. 131, 139 (1988). But if the Ninth Circuit's opinion in *Streit* is allowed to survive, the filing in California state courts of § 1983 claims alleging "overdetention" of prisoners will abruptly cease.

Given the California Court of Appeal's decision in *Peters*, such actions currently meet a rather speedy end in

state court. On the other hand, plaintiffs who decide to file the same action a block away in the federal district court can be assured of years of process there which California courts have decided is not "due." Such an anomalous and inconsistent approach will effectively eliminate the concurrent jurisdiction of California trial courts in § 1983 actions and should not be countenanced.

Amicus understands the present case involves a federal question, and likewise realizes that *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) was a case in which the court's jurisdiction was, instead, based on diversity of citizenship. While it may be that this Court "has so far avoided the choice-of-law issue in non-diversity cases," *Federal Deposit Ins. Corp. v. Timbalier Towing Co., Inc.*, 497 F.Supp. 912, 919 n. 6 (N.D. Ohio 1980), the same policy concerns which this Court considers in *Erie* cases are implicated here.

In *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496-97 (1941), this Court held:

> "The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. *Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.* [Citation.] Any other rule would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. . . . It is not for the federal courts to thwart . . . local policies by enforcing an independent 'general law' of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to

> determine whether a given matter is to be governed by the law of the forum or some other law. [Citation.] . . . And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be." (Emphasis added.)

Unless this Court grants certiorari and overrules the Ninth Circuit's *Streit* decision, the "principle of uniformity within a state" with which this Court was concerned in *Klaxon* will be thoroughly thwarted in California. Coordinate state and federal courts which "sit[ ] side by side" will continue to issue inconsistent rulings based on different views of what the law of California provides. Consequently, *Amicus Curiae* urges the Court to grant the petition for certiorari, to reaffirm that "whether a particular official has 'final policymaking authority' is a question of *state law*," *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988), and to reverse the Court of Appeals.

2. THE NINTH CIRCUIT'S LINE OF CASES LIMITING THE SCOPE OF AVAILABLE IMMUNITY DEFENSES IS INCONSISTENT WITH DECISIONS OF THIS COURT.

A. *Streit* Represents the Ninth Circuits' Latest Attempt to Limit the Scope of Available Immunity Defenses.

Streit represents the latest in a string of Ninth Circuit cases that attempt to limit the scope of available immunity defenses in the context of claims for excessive force, legislative immunity, and now Eleventh Amendment immunity. This disturbing trend cannot be allowed to continue.

(1) Ninth Circuit Limitations on Immunity in Excessive Force Cases

In *Katz v. United States*, 194 F.3d 962 (CA9 1999), overruled by *Saucier v. Katz*, ___ U.S. ___, 121 S.Ct. 2151 (2001), the Ninth Circuit affirmed the denial of defendants' motion for summary judgment on the defense of qualified immunity where plaintiff alleged civil rights violations based on his forcible removal from public speech at the Presidio Army Base in San Francisco. Katz claimed that the officers took his arms, half-walking and half-dragging him, to a military van and shoved him inside. Following a brief detention, Katz, who suffered no injuries, was released. The Ninth Circuit reasoned that a dispute of material fact existed concerning whether excessive force was used to remove plaintiff.

This Court reversed, stating that while there was no doubt that *Graham v. Connor*, 490 U.S. 386 (1989), clearly established the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness, such an inquiry was insufficient. *Saucier v. Katz*, ___ U.S. ___, 121 S.Ct. 2151 (2001). Instead, the Court held that the right which is allegedly violated "must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier*, 121 S.Ct. at 2156, *citing Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Thus, *Saucier* demonstrates that the Ninth Circuit's reasoning is inconsistent with this Court on the issue of the scope of available immunity defenses. Unfortunately,

this divergence of views extends not only to qualified immunity for excessive force; it spills over to all potential governmental immunity defenses.

(2) The Ninth Circuit's Attempt to Limit Legislative Immunity

In *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998), this Court held that "local legislators are . . . absolutely immune from suit under § 1983 for their legislative activities." In so holding, the Court noted that, "[a]bsolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.' " *Id.* at 54, quoting *Tenny v. Brandhove*, 341 U.S. 367, 376 (1951). This ruling is consistent with California's view of expansive immunity for local legislators. *See Caldwell v. Montoya*, 10 Cal.4th 972, 976, 42 Cal.Rptr.2d 842 (1995) ("[D]iscretionary act immunity extends to basic governmental policy decisions entrusted to broad official judgment. . . . *This immunity applies even where the dismissed official alleges that the members' votes were cast for reasons that violated FEHA.*" (Emphasis added, internal quotations and citations omitted)).

Although the California analysis concerns discretionary immunity as codified by California Government Code § 820.2, the rationale employed by the court is consistent with the views expressed in *Bogan*. The bench – whether state or federal – should not be permitted to look behind a legislator's vote to determine the political considerations which may have motivated it. Such an entitlement would turn the judiciary into the "thought police" and

encourage dangerous speculation about subjective machinations which are impossible to divine.

Nevertheless, in *Navarro v. Block*, 250 F.3d 729 (CA9 2001), the Ninth Circuit held that qualified immunity did not apply to a § 1983 lawsuit against the board of supervisors which alleged that prior "bad faith" votes to indemnify police officers for punitive damage awards in unrelated cases were the impetus behind alleged civil rights violations. Thus, not only was the issue of absolute immunity left unaddressed, the Ninth Circuit held that it was clearly established that local legislators were not entitled to qualified immunity if they voted to indemnify officers in "bad faith." *Navarro* at 729. Such an attempt to limit the scope of available immunity defenses is in clear violation of the expanded notions of qualified immunity articulated by this Court in *Bogan* and illustrates the Ninth Circuit's concerted efforts to chip away at available immunity defenses in general.

(3) *Streit*'s Attempt to Limit Eleventh Amendment Immunity

In *Streit*, the Ninth Circuit once again attempts to limit the scope of available immunities. This time the erosion of protection occurs in the context of the denial of Eleventh Amendment immunity where a local sheriff institutes policies regarding the release of inmates from incarceration. This ruling is in direct conflict with *McMillian*, *Pitts*, and *Peters*. *See* Argument 1, *supra*. Like *Navarro* and *Saucier* before it, *Streit* constitutes an attempt by the Ninth Circuit to inject the federal judiciary into the affairs of sovereign states by limiting the availability of immunity defenses. It cannot be allowed to survive.

B. The Insidious Effect of *Streit*

Although *Streit* attempts to resolve the various legal issues raised, the opinion actually creates more problems than it solves. Some of the areas implicated include expanding federal litigation, forum shopping, and violations of notions of state sovereignty. Worse yet, the opinion appears to be result-oriented and designed to ensure that an injured plaintiff, who has other available remedies, is allowed to file a suit under 42 U.S.C. § 1983.

(1) Expanded Federal Litigation and Forum Shopping

By refusing to follow California law on this issue, *Streit* guarantees that previously over-worked federal judges will become even more burdened. Currently, many claims alleging violations of civil rights under 42 U.S.C. § 1983 are filed in state courts, where *Peters* is binding. The *Streit* opinion, on the other hand, is binding upon all federal trial courts sitting in California. *See Jones-Hamilton v. Beaser Materials & Servs.*, 973 F.2d 688, 696 n. 4 (CA9 1992). These contradictory approaches will increase confusion and inconsistent outcomes, depending solely on whether the plaintiff files his or her action in state or federal court. Such an inconsistent application of law will result in "forum shopping" as savvy plaintiff's attorneys will opt to file their lawsuits in federal court to circumvent established California law, increasing the caseload of an already over-crowded federal judiciary.

Worse yet, the district courts will not be alone in their sudden increase in activity. Because this issue is

subject to an interlocutory appeal pursuant to 28 U.S.C. § 1292, every adverse decision by a district court will be subject to immediate review by the Ninth Circuit. *See, e.g., Behrens v. Pelletier*, 516 U.S. 299, 309 (1996). Based on this procedural reality, as well as language in *McMillian* and *Streit* which repeatedly calls for a "case by case" analysis of the issues presented, *Streit* at 560, 564 n. 13; *McMillian* at 795, the Ninth Circuit will become the *de facto* court of original jurisdiction for all civil rights cases involving sheriffs in the entire State of California.

Presently there are dozens of cases involving similar allegations pending in Los Angeles County alone. There are even more cases involving related issues, such as excessive force, jail security, and assorted law enforcement functions. The prospect of similar lawsuits in each of the 58 counties is a sobering reality. The federal judiciary will be faced with the unenviable task of engaging in a case-by-case analysis of literally hundreds, and perhaps thousands, of cases throughout the State of California.

(2) State Sovereignty

One of the most insidious results of *Streit*'s analysis is the profound impact it has on state sovereignty. By circumventing California's determination that the sheriff acts on the state's behalf, *Streit* makes the federal courts the final arbiter of who works for the state of California. This opinion is in direct conflict with *McMillian*'s proviso that "[s]tates have wide authority to set up their state and local governments as they wish." *McMillian* at 795.

The attempt to inject federal courts into a state's decision-making process regarding whether an individual acts on its behalf should not be taken lightly. This is especially so where the California courts repeatedly have held that a sheriff is a "state actor," and the Legislature has not taken any contrary action in response to this interpretation. Under these circumstances, the federal judiciary should not attempt to second-guess the State's legitimate determinations about the meaning of California law.

CONCLUSION

For all the foregoing reasons, *Amicus Curiae* respectfully urges the Court to grant the Petition for Certiorari and to hold that, for the purposes of determining *Monell* liability under 42 U.S.C. § 1983, California sheriffs act on behalf of the State of California when establishing policies and practices for releasing prisoners from incarceration.

Respectfully submitted,

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